

Ye (Migration) [2023] AATA 1897 (21 June 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Miss Qian Ye

CASE NUMBER: 1830654

HOME AFFAIRS REFERENCE(S): BCC2014/636612 BCC2018/5316953

MEMBER: Moira Brophy

DATE: 21 June 2023

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 21 June 2023 at 4:36pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – limited further evidence provided and consent to decision on papers – not living together at time of application, now permanently – no evidence of financial, household and social aspects of relationship provided – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65
Migration Regulations 1994 (Cth), Schedule 4, cl 801.221(2)(c)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 1 October 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 5 March 2014 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221 because he was not satisfied the parties were in a genuine and continuing relationship.
4. On 12 January 2023, the Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 21 February 2023. On 13 January 2023 the applicant advised the Tribunal she would not be attending the Tribunal hearing and consented to the Tribunal making a decision on the papers.
5. For the following reasons, the Tribunal has concluded that the **decision under review should be affirmed**.

6. BACKGROUND

7. The applicant was born in 1990 in China and she is a citizen of China. On 14 September 2012 she was granted a Student (Subclass 572) visa and she entered Australia on 25 September 2012. Her Student visa was current to 15 March 2014. She lodged an application for a Provisional Partner (Subclass 820) visa on 5 March 2014. The Department found that she was the holder of a substantive visa at the time of application. The applicant has declared no previous relationships. Her parents and one brother reside in China. She has one sister living in the United States of America.
8. The applicant's sponsor was born in 1973 in Pakistan. He arrived in Australia on 28 July 1997 on a Student (Subclass 560) visa which ceased on 30 September 1999. He was granted a further Student (Subclass 560) visa on 10 January 2001 which was cancelled on 20 April 2001. He was sponsored on a Partner visa by his then partner and was granted a Partner (Subclass 820) visa on 23 April 2001 and a Partner (Subclass 801) visa on 2 April 2002. He became an Australian citizen on 26 January 2005. He was previously married to Nalila Ali from 17 October 1999 to 9 January 2008.
9. On her visa application form, the applicant stated that she met her sponsor on 20 October 2012 in Sydney. They committed to a shared life to the exclusion of all others on 10 May 2013 and commenced a de facto relationship on 26 October 2013.
10. On 22 December 2014, the applicant was granted a Partner (Subclass 820) visa.
11. On 25 January 2016, the Department wrote to the applicant requesting more information to enable consideration of the application for a Partner (Subclass 801) visa. The applicant was asked to provide the information within 28 days.

12. On 24 March 2017, documentation was provided including but not limited to: income tax documents for the applicant, recent bank statements in both the name of the applicant and the sponsor, a residential tenancy agreement in the name of the applicant for the period from 15 December 2015 to 15 December 2016, correspondence addressed to both the applicant and the sponsor at the same address, photographic evidence, a copy of the sponsor's payslip, evidence of contact during periods of separation, a submission from the migration agent representing the applicant.
13. On 7 August 2018 a telephone interview was conducted with the sponsor. On 6 September 2018 a telephone interview was conducted with the applicant.
14. On 1 October 2018, a delegate of the Minister made a decision to refuse to grant the applicant a Permanent Partner visa as she did not meet the requirements of cl 801.211 or cl 801.221. The delegate was concerned the evidence provided and the inconsistencies in evidence given at time of interview indicated the applicant and her sponsor were not in a genuine relationship at the time of decision.
15. On 19 October 2018, the applicant lodged an application for a review of the Department's decision with the Tribunal. She did not provide any further documents to the Tribunal at that time.
16. On 20 October 2022, the Tribunal wrote to the applicant requesting further evidence of the current financial and social aspects of the relationship, the nature of the household and the commitment of the parties to each other and to the relationship.
17. On 2 November 2022, the applicant wrote and advised she was no longer represented by a migration agent and requesting additional time to lodge the requested documentation. Additional time was granted.
18. On 15 November 2022, the applicant provided undated photographs of the applicant and her sponsor together, a photograph of a bunch of flowers, proof of an online purchase (purported to be for the sponsor) and a photograph of two movie tickets.
19. On 12 January 2023, the Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 21 February 2023. On 13 January 2023, the applicant advised the Tribunal she would not be attending the Tribunal hearing, she would not be providing any additional documentation, and she consented to the Tribunal making a decision on the papers.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in the present case is whether the applicant and her sponsoring spouse continue to be in a genuine and continuing relationship at the time of decision.

Whether the parties are in a spouse or de facto relationship

21. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Partner (Subclass 820) visa application as the spouse or de facto partner of the applicant. In the present case, the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Partner (Subclass 820) visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

Are the parties in a de facto relationship?

22. As the parties are not validly married, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s 5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).

23. In forming an opinion about whether the parties are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision.

24. Are the parties living together or not living separately and apart on a permanent basis?

25. Based on the information in the Department's Record of Decision and the advice received by the Department from the migration agent representing the applicant and in the absence of any further evidence, the Tribunal finds that the parties were not living together at the time of the Department's decision. On the basis of the above evidence, the Tribunal finds that the parties are living separately and apart on a permanent basis.

26. Financial aspects of the relationship

27. The Tribunal finds that there is no evidence that at the time of this decision the parties have joint ownership of assets, joint liabilities or that the applicant and her sponsor pool financial resources and share day-to-day household expenses.

28. Nature of the household

29. The Tribunal finds that there is no evidence that the applicant is at the time of this decision residing with her sponsor, sharing household tasks with her sponsor, or has any joint responsibilities for the care and support of children with her sponsor.

30. Social aspects of the relationship

31. The Tribunal finds that the applicant has provided no evidence that at the time of this decision she represents herself as being in a de facto relationship with her sponsor.

32. Nature of parties' commitment to each other

33. The Tribunal finds that there is no evidence that at the time of this decision the applicant and her sponsor provide companionship and emotional support to each other or that they see the relationship as long-term.

CONCLUSION

34. On the basis of the above, the Tribunal is not satisfied that the requirements of s 5CB(2) are met at the time of this decision. Therefore, the applicant does not meet cl 801.221(2)(c).

35. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cls 801.221(2A), (3), (4), (5) or (6).

36. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

37.

DECISION

38. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Moira Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).